California Workers' Compensation Institute
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August 23, 2019

VIA E-MAIL – DWCForums@dir.ca.gov

Maureen Gray, Regulations Coordinator
Division of Workers' Compensation, Legal Unit
P.O. Box 420603
San Francisco, CA 94142

Re: Proposed Amendments to Medical-Legal Fee Schedule Regulations

Dear Ms. Gray:

These comments on proposed amendments to the Medical-Legal Fee Schedule are presented on behalf of members of the California Workers' Compensation Institute (the Institute). Institute members include insurers writing 81% of California's workers' compensation premium, and self-insured employers with $72.1B of annual payroll (31.7% of the state's total annual self-insured payroll).

Insurer members of the Institute include AIG, Alaska National Insurance Company, Allianz Global Corporate and Specialty, AmTrust North America, Berkshire Hathaway, CHUBB, CNA, CompWest Insurance Company, Crum & Forster, EMPLOYERS, Everest National Insurance Company, The Hartford, ICW Group, Liberty Mutual Insurance, Pacific Compensation Insurance Company, Preferred Employers Insurance, Republic Indemnity Company of America, Sentry Insurance, State Compensation Insurance Fund, Travelers, XL America, Zenith Insurance Company, and Zurich North America.

Self-insured employer members include Adventist Health, Albertsons/Safeway, BETA Healthcare Group, California Joint Powers Insurance Authority, California State University Risk Management Authority, Chevron Corporation, City and County of San Francisco, City of Los Angeles, City of Pasadena, City of Torrance, Contra Costa County Risk Management, Costco Wholesale, County of Los Angeles, County of San Bernardino Risk Management, County of Santa Clara Risk Management, Dignity Health, Foster Farms, East Bay Municipal Utility District, Grimmway Farms, Kaiser Permanente, Marriott International, Inc., North Bay Schools Insurance Authority, Pacific Gas & Electric Company, Schools Insurance Authority, Sempra Energy, Shasta County Risk Management, Shasta-Trinity Schools Insurance Group, Southern California Edison, Special District Risk Management Authority, Sutter Health, The Walt Disney Company, United Airlines, and University of California.

Recommended revisions to the proposed regulation are indicated by underscore and ~~strikeout~~. Comments and discussion by the Institute are identified by *italicized text*.

§ 9793. Definitions.

(c)(2) performed by a panel-selected Qualified Medical Evaluator, by an Agreed Medical Evaluator, or by the primary treating physician upon agreement of the parties, for the purpose of proving or disproving a contested claim, and which meets the requirements of paragraphs (1) through (5), inclusive, of subdivision (h).

Discussion:
A longstanding concern has been the utilization of the medical-legal fee structure by treating physicians. A regulatory limitation is needed to curtail this practice in order to avoid disputes as to whether a treating physician's report is medical-legal in nature. Accordingly, the Institute suggests new language that provides clarity to treating physicians wishing to bill for their services under the Medical-Legal Fee Schedule.

§ 9795 Reasonable Level of Fees for Medical-Legal Expenses, Follow-up, Supplemental and Comprehensive Medical-Legal Evaluations and Medical-Legal Testimony services rendered prior to [EFFECTIVE DATE].

§ 9795.1 Reasonable Level of Fees for Medical-Legal Expenses, Follow-up, Supplemental and Comprehensive Medical-Legal Evaluations and Medical-Legal Testimony services rendered on or after [EFFECTIVE DATE].

Discussion:
The proposed amendments to § 9795 do not distinguish between services that are subject to the current Medical-Legal Fee Schedule fee calculations and rules, and services that will be subject to the calculations and rules under the adopted changes. The proposed code descriptions and fees vary substantially from those currently in effect under § 9795 and warrant a separate subsection for clarity. The Institute recommends a clear demarcation in the regulatory structure based on service date.

(b) The fee for each evaluation is calculated by multiplying the relative value by $13.75, and adding any amount applicable because of the modifiers permitted under subdivision (d). The fee for each medical-legal evaluation procedure includes reimbursement for the history and physical examination, review of records, preparation of a medical-legal report, including typing and transcription services, and overhead expenses. ~~The complexity of the evaluation is the dominant factor determining the appropriate level of service under this section; the times to perform procedures is expected to vary due to clinical circumstances, and is therefore not the controlling factor in determining the appropriate level of service.~~

Discussion:
Considering the flat fee payment structure, language describing payment based on complexity and time must be deleted from subdivision (b).

(c) Medical-legal evaluation reports and medical-legal testimony shall be reimbursed as follows:

ML100 **[$325.00]** *Missed Appointment for a Comprehensive or Follow-Up Medical-Legal Evaluation*. ~~This code is designed for communication purposes only. It does not imply that compensation is necessarily owed. However, in no event shall the missed appointment fee exceed the sum of $550.~~ This code applies to failed appointments and cancellation notifications made within three business days of scheduled examination appointment. Fees for failed appointments and for late cancellations that are incurred through the fault or neglect of the injured worker or his/her representative shall be credited against the injured worker's award.

Discussion:

Identification of an arbitrary maximum fee for missed appointments does not address the underlying basis of the disputes that arise related to the applicability of a fee. The Institute's proposed language establishes differential treatment of the fee when incurred through the fault or neglect of the injured worker or their representative. Further, as a practical matter, the establishment of a maximum fee will be interpreted as the amount to be paid any time a missed appointment is reimbursed and will result in continued disputes. As an alternative, the Institute proposes a flat fee of $325. This figure is based on (a) the hourly rate of $250 adjusted for inflation from 2007 dollars ($312.33), and (b) the average paid by claims administrators for all types of missed appointments ($332).[1]

ML~~101~~ 102 *Comprehensive Medical-Legal Evaluation*. Includes all initial comprehensive medical-legal evaluations, comprising all issues of complexity and time values. The fee includes review of 400 pages of ~~medical~~ records. Review of ~~medical~~ records in excess of 400 pages shall be reimbursed at the rate of ~~$2.00~~ $1.00 per page. When billing under this code, the physician shall include in the report a verification under penalty of perjury of the total number of pages of ~~medical~~ records reviewed by the physician as part of the medical-legal evaluation and preparation of the report.

Discussion:

Use of the same Medical-Legal codes for different services depending on the date of service is confusing and may result in misapplication of fees and payments. The Institute recommends that, to the extent feasible, the Division mirror the original Procedure Codes in the amendments. For example, ML-101 should continue to reference Follow-Up Medical-Legal Evaluations and ML-102 should continue to reference a "Comprehensive Medical-Legal Evaluation" (with the necessary deletion of "Basic" inasmuch as complexity factors have been eliminated). In the description for ML-102, the Institute recommends the addition of language underscoring the Division's intent to discontinue fee determinations based on complexity and time factors. For records review, we recommend that both medical and non-medical records be treated in the same manner. An additional fee of $1.00 per page for records in excess of 400 pages is reasonable.

ML~~102~~ 101 *Follow-up Medical-Legal Evaluation*. Includes all comprehensive medical-legal evaluations performed by the same evaluating physician after the initial comprehensive medical-

[1] See Jones, S., "Changes in the QME Population and Medical-Legal Trends in California Workers' Compensation" CWCI Research Update, February 2018.

legal evaluation. The fee includes review of 400 pages of ~~medical~~ records that were not reviewed as part of the initial comprehensive medical-legal evaluation or as part of any intervening supplemental medical-legal evaluations. Review of ~~medical~~ records that were not reviewed as part of the initial comprehensive medical-legal evaluation or supplemental medical-legal evaluation that are in excess of 400 pages shall be reimbursed at the rate of ~~$2.00~~ $1.00 per page. When billing under this code, the physician shall include in the report a verification under penalty of perjury of the total number of pages of ~~medical~~ records reviewed by the physician as part of the follow-up medical-legal evaluation and preparation of the report.

Discussion:
For ML-101, all Follow-up Evaluations should be conducted by the same evaluating physician. Also, since a Follow-up Medical-Legal Evaluation may occur after one or more Supplemental Medical-Legal Evaluation reports are submitted, medical records reviewed as part of a Supplemental Medical-Legal Evaluation should not again be eligible for inclusion in the page count for the Follow-up Medical-Legal Evaluation.

~~**ML103** *Fees for Supplemental Medical-Legal Evaluations*. The fee includes services for writing a report after receiving a request for a supplemental report from a party to the action or receiving medical records that were not available at the time of the initial or follow-up comprehensive medical-legal evaluation. Fees will not be allowed under this section for supplemental reports following the physician's review of: (1) information which was available in the physician's office for review or was included in the medical record provided to the physician prior to preparing the initial or follow-up comprehensive medical-legal report; or (2) addressing an issue that was requested by a party to the action to be addressed in either an initial or any follow-up comprehensive medical-legal examination. Failure to issue a supplemental report upon request because of an inability to bill for the report under this code would constitute grounds for discipline by the Administrative Director or his or her designee. Review of medical records that were not reviewed as part of the initial or follow-up comprehensive medical-legal evaluation shall be reimbursed at the rate of $2.00 per page. When billing under this code, the physician shall include in the report a verification under penalty of perjury of the total number of pages of medical records reviewed by the physician as part of the supplemental medical-legal evaluation and preparation of the report.~~

ML-106 *Fees for Supplemental Medical-Legal Evaluations*. The fee includes services for writing a report after (1) receiving a request for a supplemental report from a party to the action or (2) receiving records that were not reviewed at the time of the initial or follow-up comprehensive medical-legal evaluation. Fees will not be allowed under this section for (A) the physician's review of records which were submitted to the physician's office for review at least 10 days in advance of the initial or follow-up comprehensive medical-legal evaluation, or (B) the physician's review of records which were previously included in the initial report, or (C) addressing an issue that was requested by a party to the action to be addressed in either an initial or any follow-up comprehensive medical-legal evaluation. Review of records submitted by a party to the physician less than 10 days in advance of the initial or follow-up comprehensive medical-legal evaluation and were not reviewed as part of that evaluation shall be reimbursed by the submitting party at the rate of $1.00 per page. When billing under this code, the physician

shall include in the report a verification under penalty of perjury of the total number of pages of records reviewed by the physician as part of the supplemental medical-legal evaluation and preparation of the report. Failure to issue a supplemental report upon request because of an inability to bill for the report under this code would constitute grounds for discipline by the Administrative Director or his or her designee.

Discussion:
For ML-106 (Supplemental Medical-Legal Evaluations), the Institute suggests revised language on issues that are often contested. For example, we have added language clarifying the timely submission of records to the evaluating physician as well as the necessity that the evaluating physician fully address the questions presented to him or her at the time of the initial or follow-up evaluation. Finally, the Institute's proposed language requires payment for records review to be made by the party who failed to submit the records in a timely manner for the initial or follow-up evaluation, which will incentivize early submission of records to the evaluating physician.

ML~~104~~ 105 *Fees for Medical-Legal Testimony.* The physician shall be reimbursed at the rate of RV ~~8~~7, or his or her usual and customary fee, whichever is less, for each quarter hour or portion thereof, rounded to the nearest quarter hour, spent by the physician. The physician shall be entitled to fees for all itemized reasonable and necessary time spent related to the testimony, including reasonable preparation and travel time. Where the deposition is not cancelled 48 hours in advance, t~~T~~he physician shall be paid a minimum of one hour for a scheduled deposition.

Discussion:
The nature of Medical-Legal Testimony (ML-105) has not changed since the last Fee Schedule, and there is no apparent basis for increasing not only the rate (from $12.50 to $13.75) but also the Relative Value (from 5 to 8) for each quarter hour spent. The combined increases in both factors results in a 76% increase in the effective hourly rate for testimony (note that the effective hourly rate as proposed is actually $440, not $424 as stated). The Institute recommends that the new Relative Value for Medical-Legal Testimony be reduced from 8 to 7. This results in an effective hourly rate of $375, which represents an effective increase of more than 50% and which fully addresses the need for increased compensation for this service.

ML 107 *Records Review.* Records reviewed in excess of 400 pages under ML-101, ML-102, and ML-106 shall be reimbursed at $1.00 per page.

Discussion:
In order to allow providers to clearly identify any charges for records review, a separate Procedure Code is required. A new Procedure Code will also allow payers to program a static payment amount (i.e., $1,650 for ML-102) while separately paying for any records review over 400 pages.

(d) The evaluation services described by Procedure Codes ML101 ~~through ML-103~~, ML102, and ML106 may be modified under the circumstances described in this subdivision.

(1) The modifiers shall not be applicable to per page charges for record review (ML107)~~in any of the Procedure Codes ML-101 through ML-103~~.

(2) The modifying circumstances shall be identified by the addition of the appropriate modifier code, which is reported by a two-digit number placed after the usual procedure number separated by a hyphen.

(3) The modifiers available are the following:

-93 Interpreter needed at time of examination, or other circumstances which impair communication between the physician and the injured worker and significantly increase the time needed to conduct the examination. Requires a description of the circumstance and the increased time required for the examination as a result. Where this modifier is applicable, the value for the procedure is modified by multiplying the normal value by 1.1. This modifier shall only be applicable to ML-101 and ML-102.

-94 Evaluation performed by an Agreed Medical Evaluator. Where this modifier is applicable, the value of the procedure is modified by multiplying the normal value by 1.25. ~~If modifier -93 is also applicable for an ML-101 or ML-102, then the value of the procedure is modified by multiplying the normal value by 1.35.~~

-95 Evaluation performed by a panel selected Qualified Medical Evaluator. This modifier is added solely for identification purposes, and does not change the normal value of any procedure.

-96 Evaluation performed by a Psychiatrist or Psychologist when a psychiatric or psychological evaluation is the primary focus of the medical-legal evaluation. Where this modifier is applicable, the value of the procedure is modified by multiplying the normal value by 1.50. ~~If modifier -93 is also applicable for an ML-101 or ML-102, then the value of the procedure is modified by multiplying the normal value by 1.60. If modifier -94 is also applicable for an ML-101 or ML-102, then the value of the procedure is modified by multiplying the normal value by 1.75. If modifier -93 and -94 are also applicable for an ML-101 or ML-102, then the value of the procedure is modified by multiplying the normal value by 1.85.~~

-97 Evaluation performed in an Underserved Area. This modifier will be applicable when an evaluation is performed in a geographic area where there were fewer than three physicians in a chosen specialty with a QME-certified office location in that geographic area as of July 1, 2019. Where this modifier is applicable, the value of the procedure is modified by multiplying the normal value by 1.25. ~~If modifier -93 is also applicable for an ML-101 or the ML-102, then the value of the procedure is modified by multiplying the normal value by 1.35. If modifier -94 is also applicable for an ML-101 or ML-102, then the value of the procedure is modified by multiplying the normal value by 1.50. If modifier 96 is also applicable for an ML-101 or ML-102, then the value of the procedure is modified by multiplying the normal value by 1.75. If modifier -93 and 94 are also applicable for an ML-101 or ML-102, then the value of the procedure is modified by multiplying the normal value by 1.60. If modifier -93, -94, and -96 are also applicable for in ML-101 or ML-102, then the value of the procedure is modified by multiplying the normal value by 2.10.~~

(4) The modifiers may be used additively, when applicable. For example, if modifier -93, -94, and -96 are also applicable for an ML-101 or ML-102, then the value of the procedure is modified by multiplying the normal value by 2.10.

Discussion:
The numbering of the rules related to modifiers under (d) is recommended for clarity.

A "geographic area" has not been defined for application of new modifier -97. The proposed suggestion of using a static date of "July 1, 2019" does not adequately consider the changing nature of QME availability and is without any reference to a database that could be used for verification; the proposal does not consider how AMEs (who do not have to be QMEs) would fairly be eligible for the substantial increase in payment rate under this modifier. The QME database from which panels are selected is dynamic in nature; as such, the qualification that there must be at least three physicians in a chosen specialty within the undefined geographic area will vary over time. In order to avoid disputes, applicability of modifier -97 would have to be clearly identified at the time an appointment is scheduled and the file or database from which the status is determined would have to retain historical information.

Without detailed definitions for "geographic area" and "underserved area," as well as details for identifying impacted physicians, it is not possible for stakeholders to assess potential positive or negative results of the proposed additional fee based on geographic area. The Institute believes that the best indicator of an "underserved area" will necessarily be based on the location of the injured worker and not the location that the physician chooses to perform evaluations. However, a method to appropriately identify whether an area is lacking in available QMEs in a particular specialty at a particular time is not immediately evident, and underscores the serious difficulty of implementing this modifier in an appropriate manner.

The Institute recommends simplifying the explanation for the use of modifiers, when used additively. Proposed subdivision § 9795.1(4) stipulates that any applicable modifiers may be used additively.

~~(f) This section shall apply to medical-legal evaluation reports where the examination occurs on or after the effective date of this section. The 2006 amendments to this section shall apply to: (1) medical-legal evaluation reports where the medical examination to which the report refers occurs on or after the effective date of the 2006 amendments; (2) medical-legal testimony provided on or after the effective date of the 2006 amendments; and (3) supplemental medical-legal reports that are requested on or after the effective date of the 2006 amendments regardless of the date of the original examination.~~

Discussion:
Subdivision (f) is applicable to the 2006 amendments, and would create confusion if included in the newly-proposed amendments.

Conclusion:
The Institute welcomes this opportunity to provide comment during the pre-rulemaking process. While we applaud the efforts of the Division to open the process to all stakeholders through open hearings and focus group meetings, the Institute is disappointed that one primary focus has been ultimately disregarded.

It has been an oft-stated necessity that the new Medical-Legal Fee Schedule address not only the reimbursement rate but also the quality of the submitted reports. During the focus group meetings, discussions centered around a "bonus" payable for a medical-legal report that serves as the basis for a settlement without the need for a supplemental report or a re-evaluation. It was proposed that the WCJ approving the settlement could simply note in the approval orders that a bonus payment was in order. The common approach was to disincentive the use of supplemental and/or re-evaluation reports, while simultaneously offering an incentive for complete reports that adequately and appropriately provide the parties with a useful basis upon which to resolve the case. The Institute is hopeful that the opening round of formal rulemaking will reintroduce the concept of ensuring quality reports to the discussion.

Thank you for the opportunity to comment, and please contact us if additional information would be helpful.

Sincerely,

Stacy Jones, Senior Research Associate
Ellen Sims Langille, General Counsel

SLJ:ESL/pm

cc: George Parisotto, DWC Administrative Director
CWCI Claims Committee
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